FILED
JAN 26 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1033

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

Case	Page
Cord v. Smith (9 Cir. 1964), 338 F.2d 516	8
La Buy v. Howes Leather Co. (1957), 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290	8
Paramount Packaging Corp. v. H. B. Fuller Co. of N. J. (D.C.Pa.1960), 190 F.Supp. 178	9
Schlagenhauf v. Holder (1964), 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152	8

OTHER AUTHORITIES

W. Barron & A. Holtzoff, *Federal Practice and Procedure*, § 1217 (Wright ed. 1958)	9
Federal Rules of Civil Procedure Rule 55	2
U.S. Code Annotated, Title 28	
Sec. 1254(1)	2
Sec. 1292(a)	3
Sec. 1292(a)(3)	7
Sec. 1651	3
Florida Statutes Annotated	
Sec. 48.161(1)	3
Sec. 48.19	3

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

NO. _____

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Steve Russ, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 30, 1972, affirming an order setting aside defaults against the respondents, and that on hearing defaults be reinstated.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2) is not yet reported.

An opinion of the District Court granting the defendants' motions to set aside defaults is not reported (App. 4, 5).

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1972. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. When defendants' motions directly misrepresent their reasons for not filing timely responsive pleadings to the complaint, when their sworn reasons show a desire to gamble on proper filing of return receipt cards showing service of process, and when their proposed answers are directly contradicted by their affidavits, is it gross abuse of discretion by a United States District Court judge to issue an order rewarding such conduct by setting aside a default entered by the clerk?

2. Does misrepresentation and calculated gambling present good cause for setting aside a default pursuant to F.R.C.P. 55?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida Statutes Annotated,
Section 48.161(1) (App. 18)
Section 48.19 (App. 18)

Federal Rules of Civil Procedure,
Rule 55 (App. 19)

U.S. Code Annotated, Title 28
Section 1651 (App. 19)
Section 1292(a) (App. 20)

STATEMENT OF THE CASE

1. On September 13, 1971, a seconded amended complaint and demand for jury trial was filed for injuries to a longshoreman engaged in stevedoring operations aboard the M/V IRA, at the Port of Miami and on navigable waters. It was alleged, *inter alia*, that said M/V IRA was owned or controlled at said time and place by Stravelakis Bros. Co., Ltd., and/or Mira Compania Naviera, S.A. The complaint was filed in the United States District Court for the Southern District of Florida, the basis of jurisdiction being diversity.

Both of these defendants were alleged to be foreign corporations not licensed to do business in Florida.

Service was attempted pursuant to Florida's long-arm watercraft statutes. They require service of process on the Florida Secretary of State and actual notice to the defendant by mail. There is also provision for the filing of the return receipt cards from such mailing.

The plaintiff began the service of such process on both defendants on October 11, 1971. Although the clerk entered default for failure to file responsive papers, these defaults were set aside by United States District Court Judge Peter T. Fay. The principal issue between the parties at that time centered on whether return receipt cards were necessary as neither such cards nor the letters they pertained to were ever returned to the sender. If actual notice were all that was necessary, as contended by plaintiff, then how could the defendants claim lack of such notice, as they hired attorneys to set aside defaults, notice of these never being supplied by the plaintiff.

2. On January 24, 1972, process on both defendants was again served on the Secretary of State of Florida.

3. On January 26, 1972, notice of service on the Secretary of State of Florida was mailed by plaintiff's counsel to both defendants.

4. On February 9, 1972, an affidavit, indicating sending of service, but lack of return receipt cards, was made by plaintiff's counsel.

5. Pursuant to motion, the court on February 14, 1972, granted a thirty-day extension in which to file the return receipt cards from the two defendants.

6. On March 3, 1972, plaintiff's counsel filed the return receipt card for Mira, showing receipt by them of process on February 1, 1972.

7. On March 7, 1972, a default was entered by the clerk as against Mira.

8. On March 7, 1972, plaintiff's counsel filed the return receipt card for Stravelakis, showing receipt by them of process on February 1, 1972.

9. On March 8, 1972, the clerk entered a default as against Stravelakis.

No notice of the filing of receipts or of defaults was sent to anyone representing either Mira or Stravelakis.

10. On March 9, 1972 defendant Mira filed a motion to set aside default with a copy of proposed answer. No affidavits were filed.

11. On March 15, 1972, plaintiff filed his "Memorandum in Opposition to Defendant Mira's Motion to Set Aside Default."

12. On March 16, 1972, defendant Mira filed a supplemental memorandum in support of its motion to set aside default.

13. On March 16, 1972, defendant Stravelakis filed its motion to set aside default with proposed answer. No affidavits were filed. They adopted the statements made by Mira.

14. On March 20, 1972, counsel for Mira and Stravelakis filed an affidavit.

15. On March 21, 1972, the lower court entered orders granting the motions of both Mira and Stravelakis to set aside entry of default.

16. On March 23, 1972, plaintiff moved to vacate the aforesaid orders and requested oral argument.

17. On March 28, 1972, the lower court denied plaintiff's motion without having heard argument.

The motion of March 9, 1972, stated, *inter alia*, that:

> "Defendant MIRA COMPANIA NAVIERA, S.A., (MIRA) moves this court for an order setting aside the default entered by the clerk on March 8, 1972, and as grounds therefor would show to the court as follows:
>
> 1. Said defendant has herewith filed its answer to the complaint.
>
> 2. Due to the great distance of the defendant, MIRA, from the Southern District of Florida, *said defendant was delayed in notifying its attorneys* of the fact that it had been served with the second amended complaint and demand for jury trial." (App. 7) (Emphasis supplied)

The March 16, 1972 supplemental memorandum of the defendants in support of the March 9, 1972 motion to set aside the default stated, in part:

> "1. Due to the great distance of MIRA from the Southern District of Florida and the inefficiency of foreign mails, said Defendant's attorneys *did not receive notice* of the fact that Defendant MIRA had been served with the Second Amended Complaint *until shortly before the default* was entered by the Clerk on March 7, 1972." (App. 11) (Emphasis supplied)

Then followed defendants' affidavit of March 20, 1972. This affidavit showed that local counsel was notified by his clients *almost immediately* after they received suit papers and not shortly before default was entered, as the motions had previously misrepresented.

"Some time *during the first week of February* of 1972, we received a telegram from MIRA's underwriters stating that suit papers had been received by the owners of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February, I examined the court file and noted that there was a summons directed to MIRA and to STRAVELAKIS BROTHERS which had been issued and served on the Secretary of State . . . " (App. 13) (Emphasis supplied)

Thus, local counsel was notified by his clients of suit one full month before default was entered.

The motions were, thus, gross misrepresentations to the Court. The affidavit is the tale of a calculated gamble that service of process would not be perfected by the filing of the return receipt cards even though both client and counsel had actual notice of the suit.

The affidavit further states that:

" . . . (S)uit papers had been received by the *owners* of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February . . . " (App. 13) (Emphasis supplied)

The proposed answers, filed with the respective motions, however, deny "each and every allegation of the complaint." Of course, the complaint alleges that Mira or Stravelakis is the owner of the M/V IRA.

An interlocutory appeal was taken to the United States Court of Appeals for the Fifth Circuit, as one from an interlocutory order in an admiralty and maritime claim within the meaning of 28 U.S.C.A. 1292(a)(3).

It appearing that the real gravamen of the complaint being diversity and that the appeal would not lie, the court was asked to treat the appeal as an application for a peremptory writ pursuant to 28 U.S.C.A. 1651. *La Buy v. Howes Leather Co.* (1957), 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290; *Schlagenhauf v. Holder* (1964), 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152; *Cord v. Smith* (9 Cir. 1964), 338 F.2d 516.

After hearing oral argument, the Honorable United States Court of Appeal issued its opinion on November 30, 1972.

> "PER CURIAM: The Order setting aside an earlier default judgment is not appealable, and the appeal is DISMISSED. Treating the matter as one seeking mandamus or other peremptory writ, there was *no abuse of discretion*, and such relief is DENIED." (App. 2) (Emphasis supplied)

Thus the Court of Appeals did entertain the application for a peremptory writ and denied it on its merits.

We seek review of the Honorable Court of Appeals' determination that "good cause" for setting aside of a default may be so found in the discretion of the District Court, where misrepresentation and outright gambling are the predicates thereof.

REASONS FOR GRANTING THE WRIT

We are aware that the law and this Honorable Court do not favor defaults.

On the other hand, we do not believe that a calculated gamble which is a losing proposition should be made a success by calculated misrepresentations to the judiciary.

In line with this reasoning, we would cite the following language from *Paramount Packaging Corp. v. H. B. Fuller Co. of N. J.* (D.C.Pa.1960), 190 F.Supp. 178:

> "... We feel the case before us differs from the cases cited by the defendant, in that here the defendant, acting through its officers, deliberately chose a course of action which it felt was tactically advantageous in the resistance of plaintiff's claim. There are no circumstances here that would justify granting the relief given in the cases cited by the defendant. To permit a defendant to ignore service of the Court's process in a belief that the process is invalid and then ask relief when that belief turns out to be mistaken would be intolerable. *A defendant who chooses to ignore a purported service of process does so at his own risk.*" (at p. 181) (Emphasis supplied)

To put the defendants' entire course of conduct in perspective, we would call this Honorable Court's attention to the following quotation from W. Barron & A. Holtzoff, *Federal Practice and Procedure*, § 1217 (Wright ed. 1958):

"Setting Aside Default.

A motion to set aside a default or a judgment by default is addressed to the discretion of the court, and an adequate basis for the motion must be shown. In exercising this discretion the court will be guided by the fact that default judgments are not favored in the law. Courts exist to do justice, and are properly reluctant to lend their processes to the enforcement of an unjust judgment. At the same time, the rules which require responsive pleadings within a limited time serve important social goals, and *a party should not be permitted to flout them with impunity.* In balancing these policies the court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was good reason for the default and that he has a meritorious defense to the action . . . " (at p. 89) (Emphasis supplied)

The facts are not in dispute; the law is not even fairly debatable. Yet, a United States District Court Judge, the Chief Judge of the United States Court of Appeals for the Fifth Circuit, a fellow judge of said court, and a distinguished judge of the United States Court of Appeals for the Second Circuit have felt that the conduct of the defendants-appellees-respondents is such as can countenance their relief from actions which are nothing short of evincing a complete disregard of the applicable rules and of the judicial system.

We respectfully submit that the judicial sanction of the actions herein can lead only to a loss of respect for the rule of law as a guiding principle of conduct.

The United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Respectfully submitted,

FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

By
Donald Feldman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for A Writ of Certiorari and the accompanying Appendix ~~was mailed~~ by hand to Smathers & Thompson, Attorneys for Respondents MIRA and STRAVELAKIS, Alfred I. DuPont Building, Miami, Florida 33131, this 24 day of January, 1973.

Donald Feldman

APPENDIX
TABLE OF CONTENTS

	App. Page
ORDER AND JUDGMENT OF UNITED STATES COURT OF APPEALS, dated November 30, 1972	2
ORDER OF UNITED STATES DISTRICT JUDGE, dated February 14, 1972	3
ORDER OF UNITED STATES DISTRICT JUDGE, dated March 21, 1972	4
ORDER OF UNITED STATES DISTRICT JUDGE, dated March 28, 1972	5
ORDER OF UNITED STATES DISTRICT JUDGE, dated March 28, 1972	6
MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF	7
MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF ON BEHALF OF DEFENDANT, STRAVELAKIS BROS CO., LTD.	8
ANSWER (MIRA)	9
ANSWER (STRAVELAKIS)	10

APPENDIX TABLE OF CONTENTS (cont.)

App. Page

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT MIRA COMPANIA NAVIERA, S.A.'S MOTION TO SET ASIDE ENTRY OF DEFAULT ____ 11

AFFIDAVIT (MERCER K. CLARKE) ____ 13

NOTICE OF FILING RETURN RECEIPT CARD 16

NOTICE OF FILING RETURN RECEIPT CARD 17

STATUTORY PROVISIONS AND RULES OF PROCEDURE

F.S.A. 48.161 ____ 18

F.S.A. 48.19 ____ 18

FEDERAL RULE OF CIVIL PROCEDURE 55 ____ 19

U. S. CODE ANNOTATED, TITLE 28

Sec. 1651 ____ 19

Sec. 1292(a) ____ 20

APPENDIX

in the Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

ORDER AND JUDGMENT OF UNITED STATES COURT OF APPEALS,

dated November 20, 1972

CASE NO. 72-2092

PER CURIAM: The Order setting aside an earlier default judgment is not appealable, and the appeal is DISMISSED. Treating the matter as one seeking mandamus or other peremptory writ, there was no abuse of discretion, and such relief is DENIED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated February 14, 1972

THIS CAUSE came before the Court on the following motion(s) of the Plaintiff, STEVE RUSS:

PLAINTIFF'S MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RETURN RECEIPT CARDS.

The Court having considered the record it is ORDERED AND ADJUDGED that: the plaintiff's Motion for Extension of Time in Which to File Return Receipt Cards is hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff shall have thirty (30) days from the date of this Order in which to file with this Court the Return Receipt Cards.

DONE AND ORDERED at Miami, Southern District of Florida, this 14th day of February, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

App. 4

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 21, 1972

THIS CAUSE came before the Court on the following motion(s) of Defendant, Mira Compania Naviera, S.A.:

Motion To Set Aside Entry of Default.

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion to Set Aside Entry of Default is hereby GRANTED.

DONE AND ORDERED at Miami, Southern District of Florida this 21st day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 28, 1972

THIS CAUSE came before the Court on the following motion(s) of Defendant, Stravelakis Bros Co. Ltd.:

MOTION TO SET ASIDE ENTRY OF DEFAULT

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion to Set Aside Entry of Default is GRANTED.

DONE AND ORDERED at Miami, Southern District of Florida, this 28th day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 28, 1972

THIS CAUSE came before the Court on the following motion(s) of Plaintiff, Steve Russ:

Motion To Vacate Court's Order dated March 21, 1972.

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion To Vacate Court's Order dated March 21, 1972 is hereby DENIED.

DONE AND ORDERED at Miami, Southern District of Florida, this 28th day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF

Defendant MIRA COMPANIA NAVIERA, S.A., (MIRA) moves this court for an order setting aside the default entered by the clerk on March 8, 1972, and the grounds therefor would show to the court as follows:

1. Said defendant has herewith filed its answer to the complaint.

2. Due to the great distance of the defendant, MIRA, from the Southern District of Florida, said defendant was delayed in notifying its attorneys of the fact that it had been served with the second amended complaint and demand for jury trial.

3. The record reflects that this court entered an order on February 15, 1972, granting plaintiff a 30 day extension of time within which to file its return receipts evidencing perfection of service of process under the Florida long arm statute. Thus, plaintiff did not strictly comply with the provision of the Florida long arm statute which required that the return receipts be filed by the return date.

4. The court having granted plaintiff an extension of time within which to perfect service of process undoubtedly based on the inefficiency of foreign postal services, it would be unfair and unjust for the court not to allow the aforesaid defendant to defend this lawsuit.

In support hereof defendant, MIRA, cites Rules no. 55(c) and 60(b) of Civil Procedure.

(Certificate of Service and Signatures omitted)

[TITLE OMITTED]

MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF IN BEHALF OF DEFENDANT, STRAVELAKIS BROS. CO., LTD.

Defendant, STRAVELAKIS BROS. CO., LTD. (STRAVELAKIS), moves this Court for the entry of an order setting aside the default entered by the Clerk on March 7, 1972, and as grounds therefor STRAVELAKIS incorporates herein the Motion to Set Aside Entry of Default filed on behalf of Defendant MIRA COMPANIA NAVIERA, S.A. and the Supplemental Memorandum of Law in Support of Defendant MIRA's Motion to Set Aside Entry of Default.

MEMORANDUM OF LAW

In support hereof, Defendant STRAVELAKIS cites Rule 55(c) and 60(b) of the Federal Rules of Civil Procedure.

(Signatures and Certificates of Service omitted)

[TITLE OMITTED]

ANSWER

Defendant MIRA COMPANIA NAVIERA, S.A. (MIRA) answers the complaint herein as follows:

Defendant MIRA denies each and every allegation of the complaint.

AFFIRMATIVE DEFENSES

1. If plaintiff's injuries occurred as alleged in the complaint, the sole and proximate cause of said injuries was the plaintiff's own negligence.

2. If said injuries occurred they were caused or contributed to by the plaintiff's own negligence.

(Certificate of Service and Signatures omitted)

[TITLE OMITTED]

ANSWER

Defendant, STRAVELAKIS BROS. CO., LTD. (STRAVELAKIS), answers the Complaint herein as follows:

Defendant STRAVELAKIS denies each and every allegation of the Complaint.

AFFIRMATIVE DEFENSES

1. If Plaintiff's injuries occurred as alleged in the Complaint, the sole and proximate cause of said injuries was the Plaintiff's own negligence.

2. If said injuries occurred, they were caused and/or contributed to by the Plaintiff's own negligence.
(Signatures and Certificate of Service omitted)

[TITLE OMITTED]

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT MIRA COMPANIA NAVIERA, S.A.'S MOTION TO SET ASIDE ENTRY OF DEFAULT

In support of its Motion to Set Aside the Entry of Default, Defendant, MIRA COMPANIA NAVIERA, S.A., (MIRA) would show the following facts to the Court:

1. Due to the great distance of Defendant MIRA from the Southern District of Florida and inefficiency of foreign mails, said Defendant's attorneys did not receive notice of the fact that Defendant MIRA had been served with the Second Amended Complaint until shortly before the default was entered by the Clerk on March 7, 1972.

2. Defendant MIRA has entered its appearance through its attorneys and has filed its Answer to the Complaint, which raises the meritorious defense that Plaintiff's alleged injuries were caused entirely or contributed to by his own negligence.

3. Defendant MIRA filed its Answer and Motion to Set Aside the Entry of Default one day after its attorneys discovered that said default had been entered.

There has been no default judgment entered in this cause; consequently, the default entered by the Clerk is only an interlocutory act looking toward the subsequent entry of a final judgment by default. No judgment having been entered, Defendant's relief is determined by the provisions of Rule 55(c) of the Federal Rules of Civil Pro-

cedure which states that: "For good cause shown the Court may set aside an entry of default . . ." To obtain relief under this provision, the Defendant in default must show good cause why a response to the Complaint was not timely filed and that he has a meritorious defense to the claim. The determination of whether good cause exists rests in the sound discretion of the Court. In distinguishing the effect of an entry of a default as opposed to a default judgment Elias v. Pitucci, 13 F.R.D. 13 (E.D. Pa. 1952), held that a Court would be justified in setting aside a default under Rule 55(c) on a showing that would not move it to set aside a default judgment under Rule 60(b). See also 6 Moore's Federal Practice, Sec. 55.10(2), p. 1831 (1971).

* * *

(Signatures and Certificates of Service omitted)

[TITLE OMITTED]

AFFIDAVIT

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

I, MERCER K. CLARKE, being duly sworn do depose and say:

I am an associate of the law firm of Smathers & Thompson which represents defendants MIRA COMPANIA NAVIERA, S.A. and STRAVELAKIS BROTHERS in the above styled lawsuit.

On December 30, 1971, this court entered an order setting aside a default previously entered against defendants MIRA and STRAVELAKIS and further quashing service of process on said defendants on the grounds that the plaintiff had failed to perfect service of process under the Florida long arm statute. At some subsequent time, plaintiff again initiated the procedure for serving defendants MIRA and STRAVELAKIS under the long arm statute, and on February 4, 1972, the summons was returned executed as to the Secretary of State. This office was never notified that service of process was again being attempted on defendants MIRA and STRAVELAKIS.

Some time during the first week of February of 1972, we received a telegram from MIRA's underwriters stating that suit papers had been received by the owners of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February, I examined the court file and noted that there

was a summons directed to MIRA and to STRAVELAKIS BROTHERS which had been issued and served on the Secretary of State. The only documentation in the file at that time indicating the date of service on the Secretary of State was the return from the U.S. Marshal's office for the Northern District of Florida which indicated that the summons and complaint had been served on the Secretary of State on January 21, 1972, at 1:15 P.M. The return itself was filed on February 4, 1972, along with the original summons. I was aware of the fact that the Florida long arm statute requires that return receipts indicating service of notice of the lawsuit on the defendant be filed with the court on or before the return date, which of course is 20 days after service of the summons and complaint on the Secretary of State. By my calculations the Marshal's return having indicated that the Secretary of State was served on January 21, the return receipts would have to have been filed by February 10, 1972, in order for service of process to have been perfected on defendants MIRA and STRAVELAKIS and the jurisdiction of the court to have attached. At the time that I checked the court file, the returns of the Marshal and the summons were the most recent papers filed in the file, all of which were filed on February 4. Neither plaintiff's subsequent motion for extension of time nor the order of the court granting that extension for 30 days had been filed on the date that I examined the court file during the first week of February. At that time I was under the very possibly erroneous impression that unless and until the plaintiff perfected service by fully complying with the long arm statute, the jurisdiction of the court could not attach to the defendants, and we were under no obligation to enter an appearance on their behalf.

Although I cannot pin-point the date, I asked our messenger to check the docket sheet on what I calculated to be the twentieth day after service of the summons on the Secretary of State, which the Marshal's return reflects was January 21. The twentieth day then would have been February 10. He reported that nothing new had been filed, and at that time I felt confident that jurisdiction of the court had not attached to our client. I did not consider the possibility that a motion for extension of time would be made that day and granted.

At some subsequent time, Mr. Marston from Fowler, White, Humkey, Burnett, Hurley & Banick, informed me that an order had been entered extending the time within which the plaintiff could file his return receipts. I had fully intended to check the court file immediately to determine the exact date of the extension, but I put it off due to other pressing matters until March 9, 1972, at which time I discovered that the return receipts had been filed. I then filed an answer on behalf of defendant MIRA and later on behalf of defendant STRAVELAKIS and motions and memorandums to put aside the defaults.

FURTHER AFFIANT SAITH NOT.

/s/ MERCER K. CLARKE

Mercer K. Clarke

(Notary's Subscription· Certificate of Service and Signature omitted)

* * *

App. 16

[TITLE OMITTED]

NOTICE OF FILING RETURN RECEIPT CARD,

dated March 3, 1972

Plaintiff hereby notices defendants of the filing of return receipt card, attached hereto, reflecting registered letter No. 631036 directed to Mira Compania Naviera S.A., c/o Stravelakis Bros. Co., Ltd. Piraeus, Greece.

(Certificate of Service and Signatures omitted)

* * *

NOTICE OF FILING RETURN RECEIPT CARD,

dated March 7, 1972

Plaintiff hereby notices defendants of the filing of return receipt card, attached hereto, reflecting registered letter No. 631035 directed to Stravelakis Bros., Piraeus, Greece.

(Certificate of Service and Signatures omitted)

* * *

48.161 Method of substituted service on nonresident

(1) When authorized by law, substituted service of process on a nonresident or a person who conceals his whereabouts by serving a public officer designated by law shall be made by leaving a copy of the process with a fee of $2.00 with the public officer or in his office. The service is sufficient service on a defendant who has appointed the public officer as his agent for the service of process. Notice of service and a copy of the process shall be sent forthwith by registered or certified mail by the plaintiff or his attorney to the defendant, and the defendant's return receipt and the affidavit of the plaintiff or his attorney of compliance herewith, filed on or before the return day of the process or within such time as the court allows . . .

48.19 Service on nonresidents operating a watercraft in the state

The operation, navigation or maintenance by a nonresident of a boat, ship, barge or other watercraft in the state, either in person or through others, and the acceptance thereby by the nonresident of the protection of the laws of this state for such watercraft or the operation, navigation or maintenance by a nonresident of a boat, ship, barge or other watercraft in the state, either in person or through others, other than under the laws of the state, or any person who is a resident of the state and who subsequently becomes a nonresident or conceals his whereabouts, constitutes an appointment by the nonresident of the secretary of state as the agent of the nonresident on whom all

process may be served in any action, or proceeding against the nonresident growing out of any accident or collision in which the nonresident may be involved while, either in person or through others, operating, navigating or maintaining a boat, ship, barge or other watercraft in the state. The acceptance by the operation, navigation or maintenance in the state of the watercraft is signification of each nonresident's agreement that any such process against him which is so served shall be of the same effect as if served on him personally.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 55

DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

U.S. CODE ANNOTATED, TITLE 28

Title 28, U.S. Code §1651(a) provides that:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28, U.S. Code §1292(a)(3) provides that:

(a) The courts of appeals shall have jurisdiction of appeals from:

• • •

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed . . .

TABLE OF CONTENTS

	Page
STATEMENT OF CASE	2
REASONS FOR DENYING THE PETITION	2
CONCLUSION	6
CERTIFICATE OF SERVICE	7
APPENDIX	

TABLE OF CITATIONS

Case	Page
Dick v. New York Life Insurance Co. 359 U.S. 437, 79 S. Ct. 921 (1959)	4
Ex parte Lau Ow Bew 141 U.S. 583, 12 S. Ct. 43 (1891)	3
Forsyth v. City of Hammond 166 U.S. 506, 17 S. Ct. 665 (1897)	5
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co. 240 U.S. 251, 36 S. Ct. 269 (1916)	5
In re Woods 143 U.S. 202, 12 S. Ct. 417 (1892)	3
Magnum Import Co. v. Coty 262 U.S. 159, 43 S. Ct. 531 (1923)	4

OTHER AUTHORITIES

SUP. CT. RULE 19	5

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S. A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF CASE

Respondents agree with the statement of the case presented in petitioner's petition as to the factual sequence of events indicated on pages 3 through 5. Respondents disagree with petitioner's accusations that there were any "gross misrepresentations" of fact to the District Court subsequent to the initial entry of the default by the Clerk of the District Court or any "calculated misrepresentation to the judiciary." Reasons for inconsistencies between respondent's initial motion to set aside the default and counsel's later affidavit were fully explained to the District and Appellate Courts to the satisfaction of those Honorable Judges, and those courts accepted such explanation as constituting "good cause."

REASONS FOR DENYING THE PETITION

Petitioner has now had an opportunity to air his accusations of alleged "gross" and "calculated "misrepresentations by counsel for respondents before four Judges, including the trial Judge and three Appellate Judges of the Fifth Circuit Court of Appeals. Not one of those four Judges has agreed with petitioner that respondents' counsel's conduct was as characterized. Petitioner now seeks a "third strike" before this Honorable Court to attempt to win his case without the necessity of going to trial on the merits. While the initial appeal was pending in the Fifth Circuit, petitioner moved for a continuance of the trial hoping that the Fifth Circuit might seriously entertain petitioner's position that the order setting aside the default constituted an abuse of discretion. (App. p. 1). Unable to convince the Fifth Circuit of the magnitude of respondents' counsel's sins and indeed unable to

convince that Court that the order setting aside the default was appealable (see the order of the Appellate Court, petitioner's Appendix, page 2), petitioner then solicited counsel for the parties to join with him in another motion to continue the trial because of petitioner's uncertain physical condition. (App. p. 3). This case *still* has not gone to trial and, in fact, is not even scheduled for trial at this time.

Petitioner based his initial appeal jurisdictionally on 28 U.S.C. §1292(a)(3) which is set forth in full in the appendix to petitioner's brief at page 20. Realizing that his position based on the statute was not sound, petitioner's counsel at oral argument requested that the Court treat the appeal as a petition for a peremptory writ as an additional grounds for jurisdiction. The Appellate Court found that the order setting aside the default was not appealable and as such should be dismissed, but treating the appeal as a petition for mandamus, the Court further found that there was no abuse of discretion. (Petitioner's appendix, page 2). Thus the Appellate Court chose to conserve judicial time and effort and disposed of the matter on the merits. The petition presently before this court represents petitioner's third attempt to argue with indignation the purported acts of misfeasance on the part of respondents' counsel, and more importantly to him, to win his case without the necessity of trying it on the merits.

This Court long ago in *Ex parte Lau Ow Bew*, 141 U.S. 583, 12 S. Ct. 43 (1891) and *In re Woods*, 143 U.S. 202, 12 S. Ct. 417 (1892), held that the Court's discretion to issue a writ of certiorari should be exercised only in situations where questions of gravity and general im-

portance are involved. In *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 79 S. Ct. 921 (1959), Mr. Justice Frankfurter discussed comprehensively the philosophy of certiorari jurisdiction. He quoted Mr. Chief Justice Taft who was explaining the past practices of this Court with respect to certiorari jurisdiction to the Committee on the Judiciary of the House of Representatives:

> "'No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.'"

In *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S. Ct. 531 (1923) Mr. Chief Justice Taft stated:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court *merely to give the defeated party in the Circuit Court of Appeals another hearing.*" (Emphasis added).

See also *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S. Ct. 269 (1916); *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S. Ct. 665 (1897).

Respondent has found no case in which this Court has specifically stated that it accepted certiorari on the grounds that the Appellate Court ". . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of that court's power of supervision." Rule 19 of the Rules of this Court. This, of course, is the consideration on which petitioner bases his grounds for certiorari jurisdiction. Decisions too numerous to set forth herein have consistently held that to set aside or not to set aside a default is wholly within the discretion of the trial court. Reason and logic dictate that the exercise by this Court of certiorari jurisdiction on the grounds that the Appellate Court "departed from the accepted and usual course of judicial proceedings" could not contemplate review of a discretionary act of a trial judge.

The Rules of this Court do not allow motions to dismiss petitions for certiorari. If such motions were entertained, a motion to dismiss the petition as frivolous would have been an appropriate response, for frivolous it certainly is.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SMATHERS & THOMPSON

By JAMES W. CRABTREE

James W. Crabtree

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three copies of the foregoing Brief in opposition to petitioner's petition for a writ of certiorari was mailed to FELDMAN AND ABRAMSON, Attorneys for Petitioner, 402 Ainsley Building, Miami, Florida this 12 day of February, 1973.

JAMES W. CRABTREE

APPENDIX

[TITLE OMITTED]

PLAINTIFF'S MOTION FOR STAY OF PRE-TRIAL AND TRIAL PROCEEDINGS PENDING APPEAL

Plaintiff, STEVE RUSS, move this Honorable Court, pursuant to Federal Rule of Appellate Procedure No. 8, to grant a stay of the pre-trial and trial proceedings in the Lower Court pending appeal. At this time pre-trial is scheduled for November 8, 1972, and trial is scheduled for November 20, 1972.

Plaintiff presently has lodged in the United States Court of Appeals for the Fifth Circuit an appeal from an interlocutory order in this case. The interlocutory order, which is the subject matter of the appeal, set aside defaults obtained by plaintiff against defendants MIRA and STRAVELAKIS. The appellate case is No. 72-2092 and is presently scheduled for oral argument in New Orleans, Louisiana on November 13, 1972. Attached hereto is a copy of the Notice to Counsel with respect to the oral argument in the Appellate Court. If plaintiff is successful on appeal and the defaults reinstated, the issue of liability against defendant, MIRA, and defendant, STRAVELAKIS, will be resolved and as such a pre-trial and trial proceeding will be a waste of time and effort with respect to these liability questions, which would require the greatest portion of trial time arising out of the issues presented by this cause.

WHEREFORE, plaintiff respectfully requests that a stay of the pre-trial conference and the trial in the Lower Court be granted pending the outcome of the appeal in order to save the time and effort of this Honorable Court and of all parties involved.

MEMORANDUM OF LAW

Federal Rule of Appellate Procedure No. 8 provides that the District Court can enter a stay or injunction pending appeal.

WE HEREBY CERTIFY that true copies of the foregoing motion were mailed to Smathers & Thompson, Attorneys for Mira, Alfred I. duPont Building, Miami, Florida 33131, Underwood, Gillis & Karcher, Attorneys for Eagle Shipping, 150 S. E. 2nd Street, Miami, Florida 33131, and Fowler, White, Humkey, Burnett, Hurley & Banick, Attorneys for Zim Israel, 501 City National Bank Building, Miami, Florida 33130, this 6 day of October, 1972.

(Exhibit 1 and signature omitted)

[TITLE OMITTED]

MOTION FOR POSTPONEMENT OF PRETRIAL AND TRIAL DATES

COME NOW the undersigned parties and move this Honorable Court for a postponement of the pretrial scheduled for December 15, 1972, and/or trial scheduled for January 2, 1972, and for grounds therefor, it is respectfully submitted as follows:

1. The parties appreciate the Court's past courtesies and accommodations, and are not unmindful of same.

2. The Plaintiff has recently undergone his third surgery and both the Court-appointed physician, DR. DONALD DOOLEY, and the treating and operating surgeon, DR. CHRISTIAN KEEDY, feel that a prognosis as to the Plaintiff's medical condition would be premature at this time.

3. It would be very difficult to try the damage aspects of this case when the physicians would not be able to give a clear-cut opinion to the trier-of-facts as to the Plaintiff's current diagnosis and prognosis. Attached hereto and made a part hereof is the most recent report of DR. DONALD DOOLEY, and that of DR. CHRISTIAN KEEDY. The latter report was received this date and transmitted to the Court virtually as soon as same was received.

WHEREFORE, it is respectfully submitted that the pretrial and trial of this cause be deferred for a period of approximately six months in order that the medical picture might be clarified as a result of sufficient time having elapsed since the claimant's third back surgery.

DATED this 13 day of December, 1972.

(Signatures and Exhibits omitted)

FILE
FILED
FEB 22 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1033

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD FELDMAN
FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

MIAMI REVIEW — 371-4653 — 377-8721

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1033

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Perhaps it is that morality derives much of its impetus in and from pragmatism.

So too, it may well be that petitioner is asking for and hoping to achieve victory by decrying conduct that should not be, but has been sanctioned.

If, however, the essence of a rule of law rather than selective judicial permissiveness is to prevail, it is extremely important that gross and flagrant violations of the rules be appropriately dealt with in a constructive manner.

Neither the District Court or the Court of Appeals have chosen to include one fact in their opinions.

The respondents herein have also not included one fact in their brief which might aid this Honorable Court in viewing the conduct complained of in a manner contrary to that which the petitioner has asserted and the cold record would compel.

That the District Court and the Court of Appeals have countenanced the flagrant violations of the rules and "sharp practice" herein only makes that conduct more imposing as it is accepted at each succeeding level of the judicial system.

We do not quarrel with respondents' statement that:

> "Respondent has found no case in which this Court has specifically stated that it accepted certiorari on the grounds that the Appellate Court '. . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of that court's power of

supervision.' Rule 19 of the Rules of this Court." (Brief in Opposition to Petitioner's Petition, p. 5)

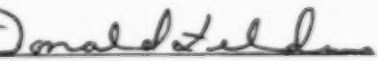
However, we are here complaining not of rules of substantive law, but rather of those dealing solely and directly with the course of judicial conduct and proceedings. It is the sanctioning of these proceedings in the lower court by the Court of Appeals, which gives greater moment to such, that calls forth the necessity for this Honorable Court to exercise the power of supervision which it possesses.

The respondents, by their lightly touched brief, appear to ask this Honorable Court not to look at what has happened and to issue the equivalent of a "writ of short shrift."

We respecfully pray that certiorari issue and the respondents come to grips with their actions in an open and meaningful manner.

Respectfully submitted,

FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

By 
Donald Feldman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was delivered by hand to Smathers & Thompson, Attorneys for Respondents MIRA and STRAVELAKIS, 1301 Alfred I. duPont Building, Miami, Florida 33131, this 20 day of February, 1978.

Donald Tilden